FOR ARGUMENT.

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IN THE

Supreme Court of the United States

October Term, 1979

No. 78-5420

THEODORE PAYTON, *Appellant,*

v.

NEW YORK, *Appellee.*

No. 78-5421

OBIE RIDDICK, *Appellant,*

v.

NEW YORK, *Appellee.*

Appeals from the New York Court of Appeals

SUPPLEMENTAL BRIEF FOR APPELLEE

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These cases were briefed fully for the October Term, 1978. They came on for argument on March 26, 1978, and were subsequently set down for reargument on October 9, 1979. We submit this supplemental brief in order to discuss some important questions that arose during the oral argument as well as a significant new decision of this Court, *Michigan* v. *DeFillippo*, —— U.S. ——, 47 U.S.L.W. 4805, which was handed down on June 15, 1979.

POINT I

Requiring any kind of warrant, either an ordinary arrest warrant or a "special" warrant, would interfere with the most basic function of our police—arresting the felon and bringing him before the court to answer charges. Moreover, an arrest warrant requirement would not give substantial protection to the privacy of the home and would undermine this Court's recent holding in *United States* v. *Watson*.

During the oral argument, several Members of the Court asked counsel for appellants to describe the type of warrant which, in his view, was required by the Constitution. Was the warrant an ordinary arrest warrant—that is, a warrant naming the person to be arrested and supported by a showing of probable cause to believe that the named person had committed a crime? Or was the warrant what we will refer to as a "special" or search warrant—that is, one that also specifies the dwelling to be searched and is supported by a showing of probable cause to believe that the person to be arrested will be found in the designated dwelling? Although a considerable portion of the oral argument was devoted to this issue, counsel was not clear about the type of warrant he was urging the Court to impose (Tr. 40-59). Nor is the issue answered, or even addressed, in appellants' brief.

Appellants' failure to address this issue reveals a fundamental and, we believe, fatal defect in their argument. Examination of the characteristics of each kind of warrant will show that neither should be required by this Court. A "special" warrant requirement would be an onerous burden that would seriously interfere with the ability of police officers throughout the country to arrest sus-

pected felons in order to bring them to justice. An ordinary arrest warrant requirement would likewise seriously interfere with the apprehension of suspected felons, would undermine the basic judgment made by this Court in *United States* v. *Watson*, 423 U.S. 411 (1976), and would not give any specific protection to the very interest that, according to appellants, needs protection—the privacy of the home.

"Special" Warrant

An ordinary arrest warrant requirement would impose burdens on police officers quite heavy enough. *See* our main brief at 51-67. The additional requirement of a special warrant would make the burdens yet more onerous. People are mobile. The basis for believing that a particular person is in a particular place may change from moment to moment. If this Court requires a special warrant, police officers would have to reappear before a magistrate to apply for a new warrant each time new information indicates that the defendant has changed his location. Apparently, not even the courts that have imposed a warrant requirement believe such a burden is justifiable. Of the courts that require a warrant before a police officer may enter a felon's apartment to arrest him, only one court, in dictum, has suggested that a special warrant is required. *United States* v. *Prescott*, 581 F.2d 1343, 1350 (9th Cir. 1978) (entry into dwelling of third party).*

* In our main brief (at 64), it was stated that a subsequent Ninth Circuit Court of Appeals decision ignored the earlier *Prescott* decision. *United States* v. *Johnson*, —— F.2d —— (Dec. 19, 1978). The opinion in *Johnson* has recently been amended to take note of and distinguish *Prescott*. —— F.2d —— (9th Cir., Aug. 20, 1979). In its amended opinion, the court upheld the warrantless arrest on the ground that the defendant had exposed himself to public view by answering the door.

There is another reason why it is unlikely that appellants would urge the adoption of a "special" warrant requirement. If such a requirement were to be announced in this case, Payton's conviction would have to be affirmed. By the time the police officers had gathered enough information to support an application for a special warrant, there was simply no time to obtain one.

On January 14, 1970, an informant, Leggett, pointed out to the officers where Payton lived. The same informant, however, gave information suggesting that Payton was not at home. There was also independent reason to believe that Payton would not have wanted to go home after the murder. *See* our main brief at 10-11. Because of all this information, it may have been a good investigative hypothesis for the officers to suppose that Payton's apartment was one possible place to look for him. But it is doubtful that, before the officers went to Payton's apartment, they had probable cause, in the constitutional sense, to believe Payton was there. Therefore, the officers could not have obtained a special warrant. However, when the police officers went to Payton's apartment and approached his door, they heard a radio from inside and saw a light shining from under the door. With this additional information, the officers did have probable cause to believe Payton was inside. Surely, at that time there were "exigent circumstances" which permitted the officers to proceed without a warrant. *See* our main brief at 60-61, 79-80.

Arrest Warrant

Neither should the Court impose the requirement of an ordinary arrest warrant. First, such a requirement, though quite burdensome, would give no specific protection to the

interest said to be involved in this case—the privacy of the home. Second, imposing such a requirement would undermine this Court's decision just three years ago in *United States* v. *Watson, supra.*

According to appellants, the important interest to be protected in this case is the privacy of the home. Supposedly, in some way an arrest warrant requirement would protect that interest. Yet, in deciding whether to issue an ordinary arrest warrant, the magistrate will not even consider the intrusion into the home. It will still be the police officer who makes the initial determination to enter a particular dwelling. And it will still be the police officer who decides initially whether there is probable cause to believe a particular person is inside that dwelling. Post-arrest litigation will still be the manner in which these judgments by the officer are reviewed.

How, then, would requiring an ordinary arrest warrant protect the privacy of the home? Only one argument suggests itself. Concededly, the magistrate's review will not be directly related to the interest to be protected—that is, the privacy of the home. The review might, nonetheless, provide some protection for that interest by screening out some arrests, not based on probable cause to believe the defendant committed a crime, that would have been effected in a dwelling.

This argument proves too much. Any restriction on the authority of police officers to make arrests inside a dwelling would provide some protection for the privacy of the home. For example, one might imagine a rule requiring the concurrence of two magistrates as to the existence of probable cause before a police officer could effect an arrest in a

dwelling. Such a rule would clearly have the collateral effect of adding some protection to privacy within dwellings, however marginal that protection might be. Equally clearly, however, a rule of this type would unacceptably interfere with legitimate law enforcement activities.

The point is that the Fourth Amendment demands reasonableness, not perfection. That a rule might add to the protection of privacy does not, for that reason alone, mean the rule is constitutionally mandated. As we have shown in our main brief (at 51-67), requiring police officers to seek the advance approval of a single magistrate before making an arrest within a dwelling would severely interfere with the most basic function of our police—arresting the felon and bringing him before the court to answer charges. Even assuming that the magistrate's review will provide some protection to the privacy of the home, that protection will be slight (*see* our main brief at 75-76) and indirect. In these circumstances, no justification exists for imposing an arrest warrant requirement upon the police.

Moreover, imposing an arrest warrant requirement is fundamentally inconsistent with this Court's decision in *Watson*. First, a police officer will often be unable to predict whether he will make the arrest in a dwelling or in a public place. An arrest warrant requirement will thus force the officer to seek the warrant in numerous instances in which the arrest is ultimately made in a public place. This is precisely the result which *Watson* rejected.

Second, the argument in favor of an arrest warrant requirement in effect concedes that a police officer can be trusted to make the initial determination to enter a particular dwelling, as long as that determination may be reviewed in litigation after the arrest. At the same time, the argument is that the same police officer cannot be trusted to make the initial determination to arrest a particular person, even though that determination is equally subject to post-arrest litigation and review. Yet *Watson* held precisely to the contrary. *Watson* held that it is constitutionally permissible for a police officer to make the initial determination concerning probable cause to believe that a particular person has committed a crime. Review of that determination in litigation after the arrest is sufficient to satisfy the commands of the Fourth Amendment. This Court's judgment on that issue was based both on the wisdom of history and on the dictates of common sense. The judgment is as sound today as it was in 1976.

POINT II

The Court's recent decision in *Michigan* v. *DeFillippo* supports the conclusion that Payton is not entitled to the benefit of the exclusionary rule. When the police officers entered his apartment in January 1970, they did so under the express authority of a state statute at a time when neither they nor any other law enforcement official could have had any serious doubts about the legality of following the statute.

In our main brief we urged that, regardless whether the police officers should have obtained an arrest warrant before entering Payton's apartment, their failure to do so does not entitle Payton to the exclusion of the evidence. The officers entered Payton's apartment to make an arrest for which they had ample probable cause. They entered in January, 1970 under the authority of a statute that had a

respected pedigree of almost a century's standing. Thus, at the time, neither they, their supervisors, nor any other law enforcement official had any reason to doubt the lawfulness of following the statute. Under these circumstances, we argued, giving Payton the benefit of the exclusionary rule would seriously subvert the salutary ends it is supposed to advance.

After our brief was filed, this Court decided *Michigan* v. *DeFillippo*, —— U.S. ——, 47 U.S.L.W. 4805 (June 25, 1979), which employed reasoning similar to that which we had urged upon the Court. There, officers arrested DeFillippo under a Detroit ordinance that gave the police power to stop and question a person if his behavior warranted further investigation. This law also provided that the individual who had been stopped was required to identify himself and produce evidence of his identity; refusal constituted a crime. After arresting DeFillippo pursuant to the ordinance, the police searched him and found that he was carrying illegal drugs. He was prosecuted not for refusing to identify himself but for unlawful possession of the drugs. On appeal, the Michigan court held the Stop and Identify law unconstitutionally vague on its face and therefore invalidated the arrest based on the ordinance. The contraband, discovered in the search incident to the arrest, was ordered suppressed.

This Court assumed that the Detroit ordinance was unconstitutional (47 U.S.L.W. at 4807), but nonetheless upheld the search and refused to suppress the drugs. Since, at the time the arrest took place, there was "no controlling precedent" that the "ordinance was or was

not constitutional," the police were entitled to enforce this "presumptively valid" enactment. *Id.* Indeed, said the Court, when a law is "presumptively valid" (as was the Detroit ordinance and as was the law under which the officers acted in *Payton*), the police should be discouraged from speculating on its constitutionality:

> The enactment of a law forecloses speculation by law enforcement officers concerning its constitutionality—with the possible exception of a law so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws. *Id.*

The Court concluded that society would be "ill served" if the police took it upon themselves to determine which laws are constitutional. *Id.*

The opinion also recognized, however, that the reasoning employed in *DeFillippo* must be used sparingly. The outer boundaries of this reasoning were not set out. But from the manner in which the Court in dictum distinguished *Almeida-Sanchez* v. *United States*, 413 U.S. 266 (1973) (47 U.S.L.W. at 4807-08), it is apparent that a refusal to apply the exclusionary rule will not be justified simply because the police can show that they were acting in good-faith reliance on some authoritative enactment. Otherwise, a legislature or even an executive agency could promulgate rules that by their own terms authorized blatantly unconstitutional searches and seizures "without probable cause and without a valid warrant." *Id.* at 4807. In addition, if the logic of *DeFillippo* were not confined within strict limits, judicial development of the Fourth Amendment might be hindered (*see* our main brief, pp. 89-91).

These considerations——discouraging legislatures and executive agencies from authorizing blatantly unconstitutional searches and seizures and encouraging development of Fourth Amendment principles—may have led this Court to give the benefit of the exclusionary rule to the defendant in *Almeida-Sanchez.** The same considerations do not, however, apply here. In *Payton,* the police officers had clear probable cause to believe that the defendant had committed a murder and was in his apartment. Therefore, a refusal to apply the exclusionary rule in this case will not encourage legislatures to enact flagrantly unconstitutional statutes authorizing searches and seizures "without probable cause and without a valid warrant." *Michigan* v. *DeFillippo,* 47 U.S.L.W. at 4807. Nor, as we discussed in our main brief, will a refusal to apply the exclusionary rule impede development of Fourth Amendment principles (*Id.* at 89-91).

The circumstances in *Payton* argue much more strongly for a refusal to apply the exclusionary rule than the circumstances in *Almeida-Sanchez.* Indeed, in this respect, our case is stronger even than *DeFillippo.* In both *DeFillippo* and *Almeida-Sanchez,* any disinterested observer would have been on notice that significant doubts existed as to the constitutionality of the statutes and regulations under which the officers acted. First of all, the applicable laws, either on their face or as interpreted by the executive branch, allowed serious intrusions on the person without even reasonable suspicion—let alone, probable cause—

* In addition, as the Court subsequently noted in *United States* v. *Peltier,* 422 U.S. 531, 542 n. 12 (1975), the Government in *Almeida-Sanchez* did not urge a construction of the exclusionary rule that would have precluded its application on the facts presented.

to believe that the subject had committed a crime. Second, the provisions were of relatively recent vintage: 1946 in *Almeida-Sanchez* and 1976 (as amended) in *DeFillippo. Michigan* v. *DeFillippo,* 47 U.S.L.W. at 4806; *United States* v. *Peltier,* 422 U.S. at 539-40. Third, the statutes were either untested, as in *DeFillippo,* or, as in *Almeida-Sanchez,* tested with arguable results. *Michigan* v. *DeFillippo,* 47 U.S.L.W. at 4807; *United States* v. *Peltier,* 422 U.S. 547 (Brennan, J., dissenting).

By contrast, the officers in *Payton* could have had no reasonable doubts about the constitutionality of their conduct. These officers, acting under the applicable New York statute, had probable cause to believe that the defendant had committed a murder and probable cause to believe that he was inside his dwelling. Then, too, the statute in question dated from 1881 and embodied centuries of accepted practice at common law (*see* our main brief at 46, 85). At the time the officers entered Payton's apartment, their conduct, authorized by the statute, had received almost unanimous approval by the courts and legislatures which had addressed the issue. Moreover, this Court had implicitly upheld the propriety of the officers' actions, and the prestigious American Law Institute had done so expressly in two model codes of criminal procedure (*Id.* at 42-49).

In sum, this is not simply a case in which the police officers acted in good-faith reliance on a statute. This is a case in which the officers were correct in relying as they did. Put another way, if prior to entering Payton's apartment, the police officers had consulted legal advisors—

within or outside the Police Department—the officers would have been told that as long as they had probable cause to believe that Payton had committed a murder and that he was in his apartment, they could lawfully enter without an arrest warrant, as they did, to effect the arrest. If, moreover, the legal advisor had had time to do extensive legal research before giving the officers advice, he or she would have discovered that the question was not a close one. The question became close only after, and largely because of, the dictum enunciated by a plurality of the Court in *Coolidge* v. *New Hampshire,* 403 U.S. 443 (1971).

In these circumstances, it would serve no useful purpose and would actually disserve the goals of the exclusionary rule to suppress evidence seized after an entry, lawful when made, to effect an arrest based on "abundant probable cause" and sanctioned by an authoritative state statute, the constitutionality of which was not in doubt. *See Michigan* v. *DeFillippo,* 47 U.S.L.W. at 4807. If we are wrong—if the exclusionary rule has come to mean that probative, reliable evidence must be suppressed even in a case such as this—then we respectfully suggest that the rule itself should be reevaluated. *See, e.g., California* v. *Minjares,* 48 U.S.L.W. 3116 (Rehnquist, J., dissenting from denial of stay, Aug. 22, 1979).

Conclusion

For the reasons stated above and in the main brief, the judgment of the Court of Appeals in No. 78-5420* (Payton) *and No. 78-5421* (Riddick) should be affirmed. *In the alternative, a remand for further proceedings should be ordered in No. 78-5420* (Payton). *See main brief at 80-81.

Respectfully submitted,

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